FILED
May 10, 2006
NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS

In the Matter of:

KENNETH ZAHL, M.D.
License No. MA56413

FINAL ORDER REVOKING
LICENSURE

WHEREAS the New Jersey State Board of Medical Examiners (the "Board") entered an Order on April 3, 2003, a copy of which is appended hereto and incorporated herein by reference, pursuant to which we ordered the revocation of the license of respondent Kenneth Zahl, M.D., to practice medicine and surgery in the State of New Jersey, and

WHEREAS the implementation of said Order was stayed pending appeal by an Order of the Appellate Division of the Superior Court entered on April 11, 2003, and

WHEREAS the Appellate Division thereafter entered a decision on June 9, 2005 affirming the entirety of the Board's decision, to include all findings of fact and conclusions of law, but remanding the matter to the Board for reconsideration of the penalty of license revocation, and

WHEREAS the New Jersey Supreme Court then granted the Board's petition for certification to review the Appellate Division's decision, and thereafter issued a decision on April 26, 2006, reversing the judgment of the Appellate Division and

remanding the matter back to the Board for the revocation of respondent's license, and

WHEREAS the Board affirms today that cause exists to order the revocation of respondent's license for all the reasons set forth in our Order of April 3, 2003,

IT is on this 10th day of May, 2006

ORDERED:

The license of respondent Kenneth Zahl, M.D. to practice medicine and surgery in the State of New Jersey is hereby revoked, effective immediately. The entry of this Order is not intended to and shall not resolve the pending administrative action against Dr. Zahl initiated by way of complaint filed on January 26, 2006, pursuant to which we previously ordered the temporary suspension of respondent's license by way of an Order filed on March 9, 2006.

NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS

By: Sindy Paul MD
Sindy Paul, M.D.
Board President

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS

In the Matter of: KENNETH ZAHL License No. MA56413	FINAL ORDER

This matter was reopened before the New Jersey State Board of Medical Examiners upon the Board's receipt of a recommended Initial Decision dated November 25, 2002 from the Office of Administrative Law ("OAL") by Administrative Law Judge ("ALJ") Edith Klinger. Within said Decision, ALJ Klinger concluded that cause existed for the imposition of disciplinary sanction against respondent Kenneth Zahl, M.D., on each of eight counts set forth within a Verified Amended Complaint filed by the Attorney General of New Jersey against respondent on October 2, 2001.[1] The Decision incorporated findings of fact and conclusions of law that were set forth in an earlier Order entered by ALJ Klinger dated August 27, 2001 granting Partial Summary Decision on Counts 1, 2 and 5 of the Complaint.

[1] The initial Complaint filed in this action was dated August 5, 1999. The Complaint was subsequently amended (Count 4 was amended to add the names of two additional anesthesiologists whose names were entered by Zahl into patients' anesthesia records) following entry of an Order granting leave to amend Count 4 on December 5, 2001.

Two orders extending the time for the Board to determine whether to accept, modify or reject the proposed findings of fact and conclusions of law of ALJ Klinger were secured from the OAL. Pursuant to the most recent Order entered February 6, 2003, the period of time for the Board to consider the exceptions of the parties and render a final decision in the matter was extended through April 17, 2003.

On February 7, 2003, Respondent Zahl filed a 72 page brief in which he raised eleven exceptions to the proposed initial decision of ALJ Klinger.[2] The Attorney General filed a ninety-nine

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[2] The specific exceptions (as catalogued in point headings) raised by respondent were the following:

1. It was error for the ALJ to grant summary decision without holding a plenary hearing on the critical issues of intent and state of mind as to the alleged Medicare billing violations and misrepresentations in connection with disability insurance claims. There were substantial questions of fact that could not be resolved on affidavits in that regard.

2. The ALJ profoundly erred in reaching a conclusion as to Dr. Zahl's conduct being "knowing" in connection with the Medicare billings based solely on the Fair Hearing Officer's decision.

3. The ALJ applied the wrong standard for the determination of dishonest conduct that violates NJSA 45:1-21(b).

4. The ALJ incorrectly concluded that there was a violation of Medicare billing requirements. The provisions of the Medicare Act and regulations set forth at §414.46 do not prohibit overlapping time charges if the anesthesiologist works alone.

5. The ALJ incorrectly used the doctrine of collateral estoppel in determining that Dr. Zahl had improperly obtained disability insurance benefits under his policy.

6. The asserted misrepresentations as to Dr. Zahl's disability benefit claims are taken out of the context in

page reply brief and an accompanying appendix on February 28, 2003. Both parties appeared before the Board on March 12, 2003, and both counsel were then afforded an opportunity to present oral argument on the exceptions. John Zen Jackson, Esq., of Kalison, McBride, Jackson & Murphy appeared and argued on behalf of respondent Zahl. Deputy Attorney General Douglas J. Harper appeared for the Attorney General of New Jersey. A hearing at which respondent was afforded an opportunity to present written and testimonial evidence in mitigation of penalty was also held before the Board on March 12, 2003.[3]

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which the representations were made.

7. The ALJ's findings of the creation of false patient records resulting from time entries is not supported by the credible evidence.

8. The insertion of other anesthesiologists' names by Dr. Zahl did not create false records or violate the Board's record-keeping regulation in a fashion justifying revocation.

9. It was error to limit the cross-examination of the sole witness Brittle on the alleged wrongful retention of double payments.

10. There was no evidence to support the knowing wrongful retention of the double payment in connection with the July 1997 treatment of patient GOH.

11. The charge of professional misconduct and lack of character for licensure is unfounded.

[3] On March 11, 2003 (the day before the scheduled hearing), a letter was received from Robert J. Conroy, Esq., counsel for the Medical Society of New Jersey, asking that the Medical Society be granted leave to participate as an *amicus curiae* in the proceeding (it is noted that Mr. Conroy previously represented Dr. Zahl in his individual capacity in these same proceedings). Within the letter, the Medical Society argued that they should be granted leave to participate as an amicus because of a perceived chilling effect that any action against Dr. Zahl's license

Determination to Adopt Initial Decision of ALJ Klinger

On review and consideration of the written submissions and written and oral arguments of the parties, we have concluded that cause exists to adopt, essentially in its entirety, the recommended findings of fact and conclusions of law set forth in the Initial Decision. We are satisfied that ALJ Klinger's decision to grant summary decision on Counts 1, 2 and 5 of the Amended Complaint was soundly entered based not only on facts that were not in dispute, but also upon conclusions of law that were logically predicated upon the factual findings made. We are similarly satisfied that ALJ Klinger's extensive findings on Counts 3, 4, 6 and 7 are overwhelmingly supported by the record below, and that her conclusions of law are similarly soundly based upon if not dictated by the findings made. Finally, we are satisfied that her conclusion that Dr. Zahl failed to maintain good moral character (Count 8) is abundantly supported by the multiple findings made concerning misdeeds committed by Dr. Zahl.

We explicitly note that this is a matter where we have afforded particular deference to the decision-making of the ALJ,

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would have on the willingness of individual practitioners to participate in the Medicare system (the Medical Society's petition only addressed the Medicare issues, and did not suggest that the Society had any position on the remainder of findings made by ALJ Klinger). Prior to commencing argument on the exceptions, we accepted oral argument from the parties on the Medical Society's application (the Medical Society did not appear before the Board). We then denied the Medical Society's petition, both for reason of its untimeliness, and because no showing had been made that the Society had a significant interest in the outcome of this case or that any claimed interests of the Society would not be adequately advanced and represented by Dr. Zahl.

for reason that the Initial Decision is, in large measure, fundamentally grounded upon and underpinned by credibility judgments, and for the additional reason that the decision-making that the ALJ engaged in did not generally involve or require application of particularized medical knowledge or expertise. With regard to our observation regarding credibility determinations, we explicitly note that ALJ Klinger's ultimate conclusions rest inexorably upon the determinations she made concerning the believability of the witnesses who testified. Specifically, ALJ Klinger repeatedly found that the witnesses who appeared for the Attorney General testified credibly, and that Dr. Zahl's testimony was not credible [indeed, ALJ Klinger found Dr. Zahl's testimony at various points to be "self-contradictory and inconsistent", Initial Decision ("ID") at p. 39 and to be "evasive, convoluted and contradictory", ID at p. 51]. ALJ Klinger's credibility determinations form a substantial predicate for her recommended decision. While we would unquestionably reach the very same credibility determinations based on our review of the transcripts of testimony alone, we note that credibility judgments necessarily are best made by the trier of fact, who has an opportunity not only to hear the testimony of witnesses, but also to evaluate first-hand the demeanor and believability of witnesses.

Additionally, we note that we have placed great weight and reliance upon the recommended Initial Decision of ALJ Klinger in this case because the vast majority of issues that she was asked

to consider and opine upon were issues that did not require resolution by the application of particularized medical knowledge. Rather, ALJ Klinger was generally required to determine whether particular conduct engaged in by Dr. Zahl was or was not dishonest and whether or not that conduct would or would not support the imposition of disciplinary sanction pursuant to N.J.S.A. 45:1-21 (b) and (e). The parties specifically stipulated that the safety or the quality of Dr. Zahl's medical practice was not an issue (ID, p.2), and thus any need to filter review of this matter through the collective medical expertise or knowledge of members of this Board is minimal (excepting the review of the charges involving record-keeping violations set forth in Counts 3 and 4).[4]

Although we have noted above reasons why we believe particular deference should be afforded the ALJ's decision in this case, we should point out that we have nonetheless carefully reviewed and analyzed the exceptions filed by respondent and the record below, and are independently satisfied that the Initial Decision should be affirmed. We thus adopt, with one minor modification, all proposed findings of fact and conclusions of law within said Decision. The only modification we deem necessary to

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[4] In making the above statements, we are aware that expert medical testimony was offered by the parties on the question whether Dr. Zahl's record-keeping methods were in accordance or at variance with accepted record-keeping practices. No medical expert testimony, however, was offered on the remainder of the charges, and therefore all charges other than those set out in Counts 3 and 4 were resolved by ALJ Klinger without reliance upon any medical testimony.

make is to vacate the proposed conclusion on Count 5 of the complaint that Dr. Zahl's conduct constituted the use and employment of fraud, false promise and false pretense (ID, p. 50). Rather, that conclusion is specifically modified so that it is limited to a conclusion that Zahl's conduct constituted the use and employment of dishonesty, deception and misrepresentation in violation of N.J.S.A. 45:1-21(b) and professional misconduct in violation of N.J.S.A. 45:1-21(e). The above modification is made only so as to conform the conclusions which ALJ Klinger made when she entered partial summary decision on Count 5 (at which time she declined to reach the question whether Dr. Zahl's conduct constituted fraud) with the conclusions reached at the time the Initial Decision was entered. Given that no additional testimony was taken on the issues raised within Count 5 from the time of entry of the summary decision Order to the time of entry of the Initial Decision, we assume that the finding within the Initial Decision that respondent's conduct constituted fraud was an inadvertent misstatement.

Rejection of Exceptions Raised by Respondent

While we find the initial decision to be compelling and firmly grounded on the evidence before the Board, we will herein briefly address the exceptions raised by respondent within his brief. Respondent's first six exceptions focus upon the entry of summary decision on Counts 1, 2 and 5 of the complaint. Although

it is the case that we initially rejected the Attorney General's application for summary decision on Counts 1 and 2 in August 1999 (see Order Denying Motion for Summary Decision, filed December 8, 1999), and ordered that those charges be referred to the OAL for plenary hearing, that application was made prior to the holding of a fair hearing before Medicare Hearing Officer ("MHO") Debra Jo Eckert focused upon the same claims and conduct which formed the predicate for the Attorney General's complaint against respondent, and the entry of a decision on June 4, 2001 by MHO Eckert which found that Dr. Zahl's submission of ninety seven claims to Medicare involving overlapping time periods for anesthesia services violated Medicare regulations and billing guidelines.[5] The MHO's decision thus addressed the very same conduct which was the subject of the complaint before this Board involving Dr. Zahl, and found that conduct to have violated federal law and regulations.

As outlined convincingly in ALJ Klinger's opinion, her decision to enter summary decision on Counts 1 and 2 was based on her conclusion that the MHO's opinion was in fact dispositive and directly supported conclusions that Dr. Zahl's conduct constituted dishonesty, deception and misrepresentation and professional

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[5] The decision of MHO Eckert was later affirmed following an appeal and a second hearing conducted before the Social Security Administration by Administrative Law Judge Dennis O'Leary. While ALJ O'Leary's opinion was not available at the time that ALJ Klinger entered summary decision on Counts 1 and 2, that opinion in fact only buttresses the conclusion reached by ALJ Klinger that summary decision was appropriate on Counts 1 and 2.

misconduct, which in turn provided grounds for disciplinary action against respondent pursuant to N.J.S.A. 45:1-21(b) and N.J.S.A. 45:1-21(e). ALJ Klinger thus found, based upon the MHO's decision, that Dr. Zahl had violated Medicare regulations and guidelines in submitting claims for overlapping time periods and that Dr. Zahl submitted claims knowing that the claims violated those regulations and guidelines. Had the MHO's opinion been rendered and available when this matter was first presented to us on motion for summary decision, we too would have found the opinion dispositive, and we too would have then entered summary decision on those matters raised in Counts 1 and 2 of the complaint.[6] We therefore reject any exception raised by respondent that suggests that it was error for ALJ Klinger to have relied on the decision made by MHO Eckert or that it was error not to have held a plenary hearing upon the allegations set forth in Counts 1 and 2 of the complaint.

Respondent also claims that ALJ Klinger erred by entering summary decision and not conducting hearings on the issues of Dr. Zahl's intent and state of mind (on those claims set out in Counts

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[6] Indeed, we note that when denying the summary decision motion in December 1999, we suggested that the trial of issues related to the Medicare claims at the Office of Administrative Law would "not focus on the factual question of what was submitted, but instead should focus on the related legal question of whether those claims in fact constituted violations of Medicare statutes, regulations or guidelines sufficient to support a conclusion that respondent engaged in acts that would support the imposition of disciplinary sanction against him pursuant to N.J.S.A. 45:1-21 (b) and/or (e)." See Board Order Denying Motion for Summary Decision, filed December 8, 1999, p. 9. We are satisfied that the need for any such hearing was obviated upon the issuance of MHO Eckert's decision.

1, 2 and 5 concerning the Medicare and disability insurance claims). Although the Attorney General charged that Dr. Zahl's conduct constituted fraud, ALJ Klinger did not find it necessary to reach and did not make any determinations upon said claim. While an argument can be advanced that need may have existed for some form of hearing had ALJ Klinger sought to determine whether Dr. Zahl's conduct was fraudulent, that need was obviated by her decision to limit her holding to findings that Dr. Zahl's conduct constituted dishonesty, deception and misrepresentation. We reject Dr. Zahl's contention that a plenary hearing was necessary to establish his state of mind before such a conclusion could be reached, and are instead satisfied that an ample record existed to support the conclusions ALJ Klinger reached that Dr. Zahl made misrepresentations and otherwise engaged in dishonest and deceptive conduct.[7]

Respondent, in his fourth exception, argues that the ALJ incorrectly concluded that he violated Medicare billing requirements. He instead argues that the provisions of applicable federal statutes and regulations do not prohibit overlapping time charges. We herein point out that the argument respondent now

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[7] The above discussion concerning the absence of need for plenary hearings is intended to address all exceptions raised by Dr. Zahl which suggest that ALJ Klinger erred by not holding plenary hearings directed at ascertaining respondent's state of mind. Specifically, we reject exceptions 1, 2 and 3, which we view as interrelated and to all suggest that ALJ Klinger committed error by not holding additional hearings to seek to establish Dr. Zahl's state of mind at the time he engaged in the conduct charged in Counts 1, 2 and 5.

seeks to make to the Board is the very argument that was necessarily rejected by both MHO Eckert and ALJ O'Leary. The federal agency possessing primary jurisdiction on Medicare questions thus rejected respondent's arguments, and principles of comity and deference to administrative interpretation of an agency's own regulation compel that this Board not reach a contrary result.

With regard to Count 5, we are satisfied that an adequate predicate existed for Judge Klinger to conclude, as she did, that the statements made by Dr. Zahl to the Equitable Life Assurance Company (ELAS) were dishonest, misrepresented fact and were deceptive. Indeed, it is clear and beyond reasonable dispute that Dr. Zahl repeatedly represented to his insurance carrier that he could not perform anesthesia procedures which he in fact repeatedly performed. The record convincingly and unquestionably establishes that the statements made by Dr. Zahl to ELAS were false. The record also establishes that payments totaling over $118,000 were made to Dr. Zahl by ELAS following Dr. Zahl's submission of the referenced statements. ALJ Klinger concluded that the issue whether Dr. Zahl was in fact "disabled" as that term was defined under the policy was irrelevant, and she instead properly focused on the issue whether the statements Dr. Zahl made were dishonest. We affirm ALJ Klinger's conclusion, and reject respondent's claim that we need to analyze the statements in some context other than the context of whether or not the statements were objectively false

(see exception 5). Further, we point out that we are satisfied that an ample and compelling predicate existed to support ALJ Klinger's determination, as there can be no reasonable question that Dr. Zahl made repeated and stark lies, and that his conduct provided basis for disciplinary sanction pursuant to N.J.S.A. 45:1-21 (b) and (e).

We similarly reject respondent's contention that ALJ Klinger incorrectly used the doctrine of collateral estoppel in determining that Dr. Zahl had improperly obtained disability insurance benefits under his policy (see exception 6). Rather, as noted above, we read ALJ Klinger's decision to state that her determination that Dr. Zahl made dishonest statements to his insurance carrier was rooted in an analysis of the statements Dr. Zahl made and the basic and irrefutable dishonesty of said statements. ALJ Klinger's decision was not dependent upon any determinations made in other fora or indeed even upon the question whether or not Dr. Zahl was "disabled" as that term was defined in his policy with ELAS. We thus point out that ALJ Klinger specifically stated that she found the finding made in the New York equitable distribution matter "cumulative to the contemporaneous patient records and Medicare claims" (emphasis added, Order Granting Partial Summary Decision, p. 14), and reject respondent's suggestion that ALJ Klinger improperly invoked the doctrine of collateral estoppel to reach her determination to grant summary decision on Count 5.

Respondent next argues that ALJ Klinger's decision on Count 3 (creation of false patient records by the insertion of overlapping time entries) is not supported by the credible evidence (exception 7), and that his practice of inserting other anesthesiologists' names in patient records similarly did not create false records (exception 8). We are satisfied that the findings made by ALJ Klinger were in fact based on the overwhelming evidence within the record created below. We find ALJ Klinger's conclusion that Dr. Zahl's regular insertion of overlapping time periods into patient records, and his practice of inserting the name of a second anesthesiologist into anesthesia records where that physician performed none of the anesthesia functions or none of the recorded intra- or post-operative anesthesia functions of induction and monitoring to unquestionably constitute the preparation of false and inaccurate patient records and to constitute the use and employment of dishonesty, deception, misrepresentation and professional misconduct.

We find the testimony offered by Dr. Lawrence Kushins and of Dr. Philip Rubinfeld that Dr. Zahl's practices deviated from accepted standards of anesthesia record keeping and that the entries were misleading to be persuasive, and affirm ALJ Klinger's conclusion that the testimony of Kushins and Rubinfeld was more reliable than that of Dr. Zahl's expert, Dr. Minore (ID, p. 39). We also point out that Dr. Kushins and Rubinfeld's testimony is entirely in accord with our general knowledge and understanding of

the manner in which medical records globally, and anesthesia records specifically, are to be prepared. Finally, we are constrained to note that the testimony of Drs. Kushins and Rubinfeld and the findings of ALJ Klinger ultimately are entirely consistent with common-sense notions of propriety -- even absent any expert testimony, we would find Dr. Zahl's record-keeping practices (particularly his practice of inserting the names of physicians who had no involvement in the care of patients in the medical record, in a manner which would suggest to one reading the record that the physician did provide the care charted in the record) to be misleading, deceptive and dishonest.[8]

Finally, we reject respondent's claims that there was no evidence to support the finding that Dr. Zahl knowingly retained double payments in connection with the July 1997 services to patient GOH (exception 10). We have reviewed the testimony of Mary Sue Brittle, and find as did ALJ Klinger that her testimony was straightforward and believable, and agree with ALJ Klinger's conclusion that Brittle's testimony supports a finding that Dr. Zahl did know that two claims were submitted and two payments received on the same claim. Ms. Brittle testified that she called

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[8] Indeed, we find Dr. Zahl's insertion of the names of anesthesiologists who were not even on the premises when particular procedures were performed, and his insertion of the name of Dr. Spina in certain records, where Dr. Spina only visited Ridgedale on two occasions after having applied for per diem employment (and, in fact, was never employed by Dr. Zahl), to be conduct which can only fairly be described as shocking and outrageous.

Dr. Zahl from his office and advised him of the identical claims and the receipt of a double payment for the November 1 date of service; in response, Dr. Zahl instructed her to leave the second check on her desk and told her he would take care of it. Further, Dr. Zahl admitted on cross examination that the claim forms were signed by him and that he knew of both of the identical claims submissions. We thus conclude that there was substantial evidence, to include Dr. Zahl's own admissions and testimony, that supported the ALJ's conclusion that Dr. Zahl knowingly retained the double payments.

We similarly reject respondent's claim that ALJ Klinger erred when she instructed Ms. Brittle not to answer the question whether she was paid to give out information concerning Dr. Zahl (exception 9). Our review of the record suggests that respondent was clearly embarking on a "fishing expedition", having no proof or evidence to suggest that Ms. Brittle in fact accepted any such payments. In any event, we are satisfied that the denial of the cross-examination, as well as the related decision to quash the subpoena which defense counsel directed to Mr. McKeown, were decisions that were well within the discretion of the ALJ.

Finally, we are satisfied that the constellation of findings made provides an adequate basis for the conclusion reached that Dr. Zahl failed to maintain good moral character. Respondent argues that the conclusion is erroneous because it is premised on erroneous findings and conclusions (exception 11), however, we have

found the ALJ's conclusions to be firmly supported on the basis of the record below.

Penalty Determination

Following entry of our determination to adopt the findings of fact and conclusions of law of ALJ Klinger, we afforded respondent an opportunity for a hearing wherein he could present mitigation evidence to the Board. Four patients then testified on behalf of Dr. Zahl.[9] Each of the patients testified eloquently as to Dr. Zahl's particular skills as a diagnostician and practitioner. Several testified that Dr. Zahl was able to diagnose conditions that other physicians were unable to diagnose. All four testified that Dr. Zahl spent significant time with them and responded to their calls at all times. All beseeched the Board not to restrict Dr. Zahl's ability to practice, as they all sought to continue to receive unabated care from Dr. Zahl.

In addition to the patient testimony, letters were submitted from 14 individuals and from ten medical colleagues of Dr. Zahl.[10] The patients who wrote on Dr. Zahl's behalf suggested that Dr. Zahl established a rapport with individuals he treated, was able to diagnose conditions other practitioners could not, and

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[9] Individual patients testifying for Dr. Zahl were Kathleen Lawson, Eric Stehling, Scott Van Moerkerken and Diana Clark.

[10] Two of the patient letters were from individuals who testified on Dr. Zahl's behalf (specifically, Scott Van Moerkerken and Eric Stehling) and two were from family members of individuals who testified on Dr. Zahl's behalf (specifically, Karen Van Moerkerken and Grant Clark).

spent significant amounts of time with people he treated. Some individuals who wrote to the Board suggested that Dr. Zahl had made unique and irreplaceable contributions to his profession, his community and his patients. Others spoke of situations where Dr. Zahl went to great lengths to help individuals. Dr. Zahl was described repeatedly as a compassionate and dedicated physician.

Physician colleagues noted that Dr. Zahl had distinguished himself as a leader and teacher in regional, ophthalmic and outpatient anesthesia, and had served as an officer of the Society of Ambulatory Anesthesia (a component society of the American Society of Anesthesiology) for eight years as a Treasurer and an at Large Director.

Respondent additionally offered the testimony of George Kenny, Esq. Mr. Kenny represented Dr. Zahl in his civil litigation with ELAS. Mr. Kenny testified that, in his opinion, respondent had been honest in his dealings with Mr. Kenny and was a person of high veracity.[11]

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[11] The Attorney General raised vigorous objections when questions were asked by defense counsel which may have sought to elicit the terms of the disability settlement between Dr. Zahl and ELAS. The Attorney General maintained that respondent had stated in his brief that the terms of that settlement were confidential, and that it would have been improper for the Board to have been made aware of those terms. While no testimony was ultimately offered on the terms of settlement, we nonetheless point out that we consider the terms of any settlement reached in the disability litigation to be irrelevant (and would not view the fact that Dr. Zahl may have been entitled to and/or in fact received payment on the disability policy to be a mitigating factor), for the reasons set forth in our discussion above, see discussion at pgs. 11-12, infra.

Respondent's wife, Margarita Zahl, testified that respondent was a loving person who went out of his way for his patients and those he helped. Mrs. Zahl beseeched the Board not to take an action that would curtail her husband's ability to practice medicine. Respondent then read a statement, wherein he urged that the Board not take action which would effect his ability to continue to care for his patients. Respondent pointed out that he had not harmed any patients, and stated that his patients would be the unintended victims of any Board action. When asked on cross-examination whether he had done anything wrong in this case, respondent conceded that he made some "mistakes" in regard to charting, but claimed that he had not done anything wrong with regard to billing of Medicare and continued to maintain that his statements made to his disability carrier had been taken out of context.[12]

We note that there is a striking irony in this case. While the letters submitted and testimony offered suggest that Dr.

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[12] On cross examination, the Attorney General referenced two documents which were moved into evidence. R 6 was a March 29, 2000 letter from Stuart Minkowitz, Assistant U.S. Attorney to Robert J. Conroy, advising that the US Attorney did not intend to pursue a civil action against Dr. Zahl as of the date of the letter (the letter further stated that the decision should not be construed as a determination as to the merits of the allegations that had been investigated, nor would the decision prohibit the Medicare carrier, the Health Care Finance Administration or the Department of Health and Human Services from seeking appropriate administrative relief). R-7 was a "Response to a Motion of Law Guardian and Cross Motion" filed by Dr. Zahl on October 19, 2002 in New York Family Court. We ordered that R-7 be sealed, as it included sensitive information concerning Dr. Zahl's custody case being heard in the Family Court of the State of New York.

Zahl may be a particularly revered and respected physician, Dr. Zahl's own misdeeds paint an entirely different picture of a fundamentally corrupt and dishonest licensee. We are constrained to point out that the fundamental issue we have considered in determining penalty to be meted out is not whether Dr. Zahl is a competent practitioner (indeed, it was stipulated that the safety or the quality of care provided by respondent to his patients was never an issue in this case), but rather what sanction is necessary to redress Dr. Zahl's many misdeeds.

We have concluded, as did ALJ Klinger, that the panoply of dishonest acts committed by Dr. Zahl support, if not dictate, imposition of the severe penalty of license revocation. The acts bespeak a fundamental disregard for truth which is ultimately inimical to the practice of medicine. Nothing presented in mitigation suggests that Dr. Zahl even today understands the moral repugnancy of his multiple acts of dishonesty and deception. We agree with the observations and findings set out in ALJ Klinger's opinion that discuss the reasoning which underlay her recommendation that Dr. Zahl's license be revoked, and we affirm her recommendation that Dr. Zahl's license be presently revoked.

On the question of penalties, we have determined to reduce the recommendation made by ALJ Klinger that a $35,000 penalty be assessed and instead impose a penalty of $30,000. We do so based on the Attorney General's analysis that the proposed penalties on Counts 6 and 7 should be adjusted downward from $5000

to $2500, because each of those counts were based not on multiple acts but on one misdeed. While we are cognizant that we could substantially increase the proposed penalties on Counts 1 through 5 of the Complaint, as each of those Counts were based on multiple actions, we agree with ALJ Klinger that assessing penalties on each individual act would result in the imposition of an excessive penalty, and we instead ratify ALJ Klinger's recommendation that penalties of $5000 be assessed on each of Counts 1 through 5 of the complaint. We similarly ratify ALJ Klinger's recommendation that respondent be required to make restitution in the amount of $1700 to the Association Master Trust Insurance Company.

Finally, we ratify ALJ Klinger's determination that Dr. Zahl should be assessed costs for the use of the State as authorized pursuant to N.J.S.A. 45:1-25(d). We decline, however, to presently set the amount of costs to be assessed, in order to afford respondent an adequate opportunity to respond to the proposed costs sought as set forth in a certification of costs dated March 7, 2003, submitted by Deputy Attorney General Harper. Given that the Attorney General is seeking costs totaling $229,369.72 (as of February 28, 2003), to include in excess of $182,000 in attorney's fees, we will presently table making any determination fixing the amount of costs to be awarded so that respondent may first have an opportunity to reply to the Attorney General's certification, should he have any objection to imposition of any of the items sought as costs (to include any amounts that

may be sought in any supplemental cost certifications which may be filed by the Attorney General). In such case, we will then consider this matter on the papers submitted, and enter a supplemental order establishing the amount of costs to be assessed. In the event no written reply is received from respondent, the Board will assume that the respondent has no objection to any particular item claimed as a cost, in which case a supplemental Order will issue fixing the amount of costs to be assessed at the amount sought by the Attorney General.

WHEREFORE, it is on this 3rd day of April, 2003

ORDERED:

1. The license of respondent Kenneth Zahl, M.D., to practice medicine and surgery in the State of New Jersey is hereby revoked. The revocation shall be effective as of 5:00 p.m. on April 11, 2003 (thirty days from the date that the Board's decision was announced on the record). During the period between the announcement of this Order on the record (March 12, 2003) and the effective date of the revocation, respondent shall neither see nor treat any new patients, and respondent shall make arrangements during said time period for the transfer of care of his existing patients and for transfer of said patients' records.

2. Respondent is hereby assessed civil penalties in the amount of $30,000. Said penalties shall be paid in full within thirty days of the date of entry of this Order, or pursuant to a

schedule of payments, to include an assessment of reasonable interest, which may be deemed acceptable by the Board.

3. Respondent is ordered to make payment of costs for the use of the State. Respondent shall submit, on or before April 11, 2003, a written submission setting forth any objections he may have to any items sought to be recovered as costs set forth within the certification of costs filed by the Attorney General on March 7, 2003, and within any supplemental cost certifications which may be filed by the Attorney General. The Board shall thereafter consider the written submissions of the parties, and shall, by way of supplemental order, fix the amount of costs to be assessed in this matter.

4. Respondent shall make restitution in the amount of $1700 to Association Master Trust Insurance Company. Restitution shall be tendered within thirty days of the date of entry of this Order, and respondent shall provide proof to the Board that restitution as ordered herein has been made.

NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS

By: William Harrer MD BLD
William V. Harrer, M.D., B.L.D.
Board President